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Supreme Court of the United States

OCTOBER TERM, 1956

No. 222.

FISHER STUDIO, INC., ROBERT V. FISHER and DAVID ISACSON,

Petitioners,

against

LOEW'S INCORPORATED, PARAMOUNT PICTURES CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, WARNER BROS. PICTURES, INC., WARNER BROS. PICTURES DISTRIBUTING CORPORATION, RKO RADIO PICTURES, INC., COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., UNIVERSAL PICTURES COMPANY, INC., UNITED WORLD FILMS, INC., REPUBLIC PICTURES CORPORATION, FILMS, INC., PICTORIAL FILMS, INC., MOVIES EN ROUTE, INC., MOVIES U.S.A. INCORPORATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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AUDREY HUBBARD,
MELVIN MICHAELSON,
of Counsel.

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LOEW'S INCORPORATED, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioners, Fisher Studio, Inc. and Robert V. Fisher and their attorney, David Isaacson, pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for review of so much of the judgment of that court filed April 2, 1956 in the above captioned cause as disqualified petitioner Isaacson from representing the petitioners-plaintiffs in this case.

Opinions Below

The opinion of the Court of Appeals is reported at 232 F. 2d 199 and is set forth in full at pp. 21-29, *infra*. The opinion of the District Court has not been officially reported.

It has been unofficially reported in 1956 Trade Cases, par. 68,305 and is printed at pp. 10-18a [1] of Appellants' Appendix in the Court of Appeals.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1). The judgment of the Court of Appeals was entered April 2, 1956.

Question Presented

Consistent with the constitutional guarantee of due process and the requirements of fair judicial proceedings in federal courts,

(a) May an attorney be disqualified on the basis of secret evidence; i.e., files which were withheld from the attorney and his counsel but were described by the hostile party and read *ex parte* by the Court?

(b) Can constitutional objections to the use of such secret evidence be deemed waived by implication?

(c) Where, as the Court of Appeals found, the District Judge "acted far from judicially," showed "personal pique," and "should not have taken the trial into his own hands," can his order of disqualification stand?

Statement of the Case

This is an appeal from an order disqualifying petitioner Isaacson and the law firm of Malkan & Isaacson from representing the petitioners-plaintiffs in this case. Disqualifica-

[1] Pp. 10-18a refer to pages as numbered in Appellants' Appendix in the Court of Appeals. Nine copies of such Appendix are being filed for this Court's use.

tion was based on Isaeson's alleged access during a prior employment to files which allegedly contained information that might be useful in the instant case.

The Court's finding of confidential information rested largely on testimony by Isaeson's former employer characterizing the contents of his firm's 16 mm. files and on the District Court's *ex parte* examination of the files. These files were withheld from your petitioners over objections and were neither entered in evidence nor marked for identification.

This reliance upon secret evidence unquestionably constituted a denial of due process which, petitioners submit, vitiated the entire proceeding. The rest of this Statement sets forth the undisputed factual background merely to demonstrate the crucial nature of the secret evidence and the District Court's reliance thereon.

Petitioner Isaeson was employed—first as an auditing clerk on the night shift, later as a lawyer—from November 1946 to March 1951 by Sargoy & Stein (49a). That firm, on behalf of the eight principal motion picture distributors, employed up to 100 laymen, mostly auditors or investigators, and a handful of lawyers. Its primary mission was to ferret out evidence and recover damages from independent theatre operators (i. e., 35 mm. film exhibitors) who underreported their box office receipts in order to avoid paying the proper film rentals. Even in the 35 mm. field the firm never appeared in any antitrust litigation.

It is undisputed that the major part of Isaeson's work for Sargoy & Stein after he became employed as a lawyer was "going around various parts of the country to take depositions [of independent theatre operators] that as a rule supplemented the audits * * *" in underreporting cases (62-3a, 40a, 52a).

Sixteen months after he left that employment, Isaeson and the firm of Malkan & Isaeson filed the instant antitrust

suit against the major film distributors and others. This suit was novel. The plaintiffs are itinerant exhibitors of 16 mm. films; they are not in the theater business, which uses 35 mm. film and is admittedly Sargoy & Stein's principal concern. Plaintiffs' is not the usual complaint that the principal motion picture producers and distributors have conspired to monopolize the cream of the business of exhibiting film in theatres (i. e. 35 mm. films) by discriminating in run and clearance against independent theatres. The instant suit, complaining of antitrust violations in the distribution of films to non-theatrical exhibitors (i. e., 16 mm. films), was modeled on the complaint in *United States* v. *Twentieth Century-Fox et al.* (S. D. Cal. 1952), which was not filed until 15 months after petitioner Isaeson had left Sargoy & Stein's employ (48a, 126a). In that suit the Government complained of a separate and different conspiracy from the 35 mm. conspiracy proved in *United States* v. *Paramount*, 334 U. S. 131. Thus the Government tacitly conceded that the conspiracy established in the *Paramount* case did not apply to the non-theatrical or 16 mm. field. Indeed, the recent determination of the *Fox* case in favor of the defendants held that there was no over-all conspiracy in 16 mm. film distribution, such as there was in the 35 mm. field. *United States* v. *Twentieth Century-Fox*, 137 F. Supp. 78.

There was never any 16 mm. film litigation of any kind in the office of Sargoy & Stein. The firm's sole activity in connection with 16 mm. films was to make a few of its investigators available to assist in recovering stolen 16 mm. prints which had been expressly made for and leased to the Armed Forces (152a).

It is undisputed that Isaeson had virtually no assignments in these 16 mm. matters. The sum total of his 16 mm. work, accepting all of defendants' testimony, was trifling (98-9a, 100a).

Nevertheless, the defendants moved to disqualify petitioner-attorney, claiming that Isaeson had received, or

had access to, confidential information that could be used in this suit. The proceeding was referred to a special master.

Defendants admitted that Sargoy & Stein, Isaeson's employers, had never worked on any cases similar to the instant one. But they asserted that their files on the recovery of stolen 16 mm. prints contained intelligence that could be valuable in the trial of this suit.

Accordingly, defendants found it essential to establish the nature of the contents of their 16 mm. files. They used the files to prove two crucial points: 1) that the files contained confidential information useful in the instant case; and 2) that petitioner Isaeson had had access to the files.

Sargoy was permitted, over petitioners' objections, to describe the contents of these files freely. Petitioners were denied the right to see the files and, therefore, had no real opportunity to cross-examine. The Special Master then read the files *ex parte*, announcing that he would accept any paper therein (or his construction thereof) as conclusive wherever it might contradict (or seem to the Master to contradict) any point in petitioners' testimony (105a). Thereafter he recommended that petitioner-attorney be disqualified against all the defendants herein.

Without hearing petitioners or their counsel, the District Judge accepted the Special Master's recommendation. In his opinion the Judge borrowed heavily from the Master's description of the alleged contents of the files withheld from the petitioners. See p. 12, *infra*.

Petitioners moved for a rehearing, submitting the affidavits of two witnesses. One was Hilton, previously unavailable, who had been in charge of Sargoy & Stein's 16 mm. files during the period of Isaeson's employment and was admittedly the only person with any real knowledge of the contents of the files as of that period (84a, 129a, 147-8a, 150a). The other, Siegel, had been defendant's prin-

cipal witness other than Sargoy and wished to recant (218-227a).

The District Court, refusing to accept the affidavits, directed that the witnesses be produced. At this point, petitioners were afforded their first and only opportunity to be heard by the District Judge. Once again the Court withheld the 16 mm. files from the petitioners, but explicitly relied on what the files "indicate" (196a) and on that basis decided to "disbelieve this witness" (205a).

The Court of Appeals affirmed the disqualification (*infra*, pp. 21-29) except as to five of the fourteen defendants. It held the possible denial of due process immaterial, saying that the use of secret files was harmless error; that the withholding of evidence sought by petitioners was not a deprivation of due process because it did not "fill gaps" in the affirmative proof and could not provide "that affirmative exoneration which is vital for their [petitioner-attorneys'] salvation"; and that the Constitutional claim had been waived by implication.

Reasons for Granting Writ

The decision here for review, affirming the disqualification of an attorney in a civil antitrust proceeding, directly involves a number of issues which have repeatedly evoked this Court's serious attention in recent Terms and which have consistently been viewed as basic to the fair and impartial administration of justice.

(a) The imposition of penalties upon attorneys has traditionally been scrutinized with the greatest care by this Court, whatever the particular form and context. See, to choose the most recent examples, *Offut* v. *United States*, 348 U. S. 11 (1954); *In re Levy*, 348 U. S. 978 (1955) (summary reversal); and *Cammer* v. *United States*, 24 U. S. Law Week 4131 (3/12/56). Careful review is particularly warranted in this case because of this Court's special re-

sponsibility in supervising the administration of justice in the lower federal courts. See *McNabb* v. *United States*, 318 U. S. 332, 341 (1943).

(b) The proceeding here involved takes on even broader significance because of the serious impairments of procedural rights. The disqualification order here rests largely on documents which the attorney and his counsel were not permitted to inspect, and with respect to which they were therefore deprived of the right to cross-examination. Again and again, this Court has expressed its aversion to secrecy in judicial proceedings; e.g., *In re Oliver*, 333 U. S. 257 (1948). As infringements have taken novel forms and appeared in varying contexts, this Court has had to reemphasize the vital importance of the right to cross-examine and the vice of secret evidence in impairing that right. See, e.g. *Peters* v. *Hobby*, 349 U. S. 331, 337-8 (1955) (recognizing seriousness of constitutional problem); *Simmons* v. *United States*, 348 U. S. 397 (1955); *Gonzales* v. *United States*, 348 U. S. 407, 414 (1955).

(c) This Court's recognition of the importance of safeguarding procedural due process is reflected in its insistence that a waiver of such rights is not to be found without the clearest proof of such waiver. *Johnson* v. *Zerbst*, 304 U. S. 458, 464; *Ohio Bell Telephone Co.* v. *Public Utility Comm.*, 301 U. S. 292. In disregard of this principle the Court below implied a waiver on clearly inadequate grounds.

(d) Similarly, this Court has consistently been on guard against disorderly court proceedings presided over by Judges falling short of the basic standards of impersonal judicial conduct. See, e.g., *Offut* v. *United States*, *supra*, 348 U. S. at 14; *Moore* v. *Dempsey*, 261 U. S. 86 (1923); *Tumey* v. *Ohio*, 273 U. S. 510 (1927). Here the conduct of the only relevant hearing before the District Judge clearly calls for condemnation by this Court. The Court of Appeals found that the District Judge "acted far from judicially in his interruptions of the witnesses and counsel and

his attitude showing personal pique and offense at the challenge to his prior ruling. He should not have taken the trial into his own hands; see *United States* v. *Steiner Plastics Mfg. Co.*, 2 Cir., March 16, 1956;[2] indeed, it would have been preferable that no formal hearing be held rather than one of such partial character." These observations, restrained though they were in view of the record, make the lower court's affirmance of the disqualification order all the more indefensible and indeed may warrant summary reversal.

(e) The seriousness of these infringements of basic rights is heightened by their occurrence in a case marking the latest extension of the law of disqualification in motion picture antitrust cases. This recent extension has elicited widespread concern in the profession and has been criticized by commentators (see p. 16, *infra*). Assuming that the broadening bases for disqualification orders are supportable, it is all the more necessary to safeguard accused attorneys against abuses by assuring them their basic procedural rights in orderly proceedings before impartial tribunals.

These vital protections, we submit, were not afforded here. In denying these rights, the decision of the Court of Appeals more than satisfies all the relevant criteria governing the exercise of this Court's reviewing power. The decision below is in conflict with the controlling constitutional principles as enunciated by this Court and lower federal courts. *A fortiori* it departs from the procedural standards which this Court has set forth in the exercise of its supervisory power over lower federal tribunals. And, as the Court of Appeals' own description of the District Judge's conduct demonstrates, the affirmance below so far sanctions "a departure from the accepted and usual

[2] *Steiner Plastics* was another, though less extreme, instance of unjudicial conduct by Judge Abruzzo, the District Judge below. For further reported illustration of Judge Abruzzo's unjudicial procedures see p. 16, *infra*.

course of judicial proceedings * * * as to call for an exercise of this court's power of supervision." (Rule 19(b) of this Court.)

The right to a trial based on known evidence is fundamental. Hence, either the denial to petitioners of any opportunity to inspect the 26 crucial files whose contents were described in defendants' testimony or the *ex parte* reading of, and reliance upon, those files by the Master and the District Court should alone have sufficed to vitiate the entire proceeding. But the Court of Appeals condoned this procedure on grounds which violate precedent and principle and which encroach on the right to a fair trial.[3]

1. For the first time, so far as we can discover, a Court of Appeals has apparently treated as harmless error a denial of the fundamental right to a fair trial.

Previously, this Court and the intermediate federal courts had always recognized that a decision resting on evidence received in violation of due process of law must be reversed without speculation on what the result might have been if a fair trial had been held without the secret, or otherwise tainted, evidence. The coerced confession cases are, of course, the classic example of this Court's refusal to weigh the untainted evidence where the proceeding is constitutionally defective. Moreover, that basic principle has been uniformly and rigorously enforced by this Court in every other context in which it has arisen. See, e.g., *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292; *Philadelphia Co.* v. *Securities and Exchange Commission*, C. A. D. C., 1949, 175 F. 2d 809, vacated as moot, 337 U. S. 901; cf. *Inland Steel Co.* v. *National Labor Relations Board*, 7 Cir. 1940, 109 F. 2d 9, 20-1.

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[3] Some discussion of the factual background seems appropriate, not to establish the violations of petitioners' procedural rights, but merely to emphasize the grievousness of the violations.

Thus, in *United States* v. *Coplon*, 2 Cir., 185 F. 2d 629, the defendant's guilt seemed well established by competent evidence, and the wiretap records she sought were remote from the main issue, unlike the files in the instant proceeding. Nevertheless, the Court of Appeals (Learned Hand, C.J.) reversed her conviction on principles repeatedly recognized by this Court, saying:

> "* * * In the case at bar it may seem to have been a flimsy grievance to deny to Judith Coplon the opportunity to argue that these records did 'lead', or might have 'led', to her conviction: in truth it is extremely unlikely that she suffered the slightest handicap from the judge's refusal. But we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor." (185 F. 2d, at 638.)

Likewise, in *Pouchatan Mining Co.* v. *Ickes*, 6 Cir., 118 F. 2d 105, 109-10, the harmless error doctrine was held inapplicable, as follows:

> "It is argued that apart from the tabulations, there is sufficient evidence supporting the director's findings. But we may not assume that the director would have made the same findings if full hearing had been accorded." * * *
>
> "One who has been denied access to information or deprived of the privilege of cross-examination on pertinent matters is not in a position to make an offer of proof as to those matters. Likewise, a reviewing court cannot know what a full hearing might have shown and for that reason is not free to speculate as to the prejudice involved in such an erroneous ruling.
>
> "The fact that the director's order might be justified on the merits does not obviate the requirement of a fair trial."

The insidious danger of treating as harmless error the violation of a fundamental right is dramatically illustrated in this case. On principle the unconstitutional receipt of

secret evidence should not have been disregarded on the basis of speculation as to its weight. Here, moreover, it is demonstrable that the secret evidence was anything but harmless and in fact had a substantial and probably decisive impact.

Comparison of the following statements reveals how the unsworn assertions by defendants' counsel during argument and the Master's observations based on *ex parte* reading of the files formed the core of the District Court opinion and were adopted by the Court of Appeals. There is no basis but the withheld files themselves for any of the following:

Defendants' Counsel
(Unsworn)

"* * * There is contained in these files material bearing directly on the issues in the Kunz case and on the issues in the Fisher case.

These files are replete with information of that character; and in addition opinions written by Mr. Sargoy to his clients, contracts containing restrictions with reference to the use of 16 mm. pictures, the policies with respect to their distribution and the withholding of distribution under certain circumstances and conditions of 16 mm. pictures.

They contain information as to which company did, and to what extent, conduct business in the 16 mm. field * * *" (101-2a).

Master

"* * * members of its [Sargoy & Stein's] staff acquired knowledge of the manner in which the companies did business in the 16 mm. as well as the 35 mm. field. This included knowledge as to which companies produced 16 mm. prints; the use to which they put them; the manner of licensing of 16 mm. pictures for exhibition; the limitations, if any, that were imposed on the distribution; the contractual provisions between the companies and their licensees, limiting the use of the pictures; and the terms of the licenses. Needless to say, such information would be of incalculable value in preparing and trying an antitrust suit against the motion picture companies.

The aforesaid knowledge got into the files which were accessible to Mr. Isacson. Mr. Isacson had a key to

District Court

"* * * As such employee, Isacson was able to obtain knowledge as to which companies produced 16 mm. prints, the use to which they were put, the manner of licensing 16 mm. pictures for exhibition, the limitation of contractual provisions between the companies and the licensees, and the terms of the licenses. This knowledge was accessible to Isacson from the files of Sargoy & Stein. Such information, undoubtedly, would be of incalculable value in preparing and trying the instant case" (13a).

Court of Appeals

"As a member of the firm's staff, he was in a position to acquire knowledge of the manner in which the companies did business in the 16 mm., as well as the 35 mm., field. This included knowledge as to which companies produced 16 mm. prints; the use to which they put them; the manner of licensing of 16 mm. pictures for exhibition; the limitations, if any, that were imposed on the distribution; the contractual provisions between the companies and their licensees, limiting the use of the pictures; and the terms of the licenses. All this information was accessible to him from the files of Sargoy & Stein" (___).

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Thus the Court of Appeals uncritically accepted *ex parte* characterizations of files which it did not see—characterizations, moreover, by a District Judge whose conduct it could not approve. This compounded the error for which this Court reversed in *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U. S. 292, 304 (1937), where Mr. Justice Cardozo observed:

> "What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known. (Citations.)'"

2. The Court of Appeals imputed to petitioners a waiver of their constitutional rights. The waiver was found in a request made by the Master that both sides waive whatever "evidentiary" objections they did not explicitly raise in their briefs to be submitted thereafter. This request came on the final day of the hearings—after the Master's *ex parte* examination of the withheld files and after petitioners' time to cross-examine had expired. There was no waiver in fact at that time, since petitioners' brief before the Master complained of the withholding and *ex parte* use of the files.

Moreover, during the hearings petitioners' counsel had protested at length against the manner in which defendants and the Master used the files but withheld them from petitioners. From the outset of defendants' testimony about the files, petitioners asked that the files themselves be produced, and defendants promised to produce them (82-5a). Meanwhile, cross-examination of defendant's witness was necessarily suspended (90a).

Not until the conclusion of the testimony of defendants' last witness on the files did defendants announce that they did not intend to produce them (102a). Yet, at the very time that defendants first claimed that the files were too confidential to be seen by Isaacson or his counsel, they pressed the files on the Master for *ex parte* examination. To this

astonishing proposal appellants' counsel vigorously objected (103a). But the Master ignored the objections and fully accepted Mr. Phillips' novel proposal. Without even considering whether the files were authentic and regular, the Master undertook to look at them *ex parte* and decide the extent to which they supported or contradicted defendants' characterizations and evaluations of their contents.

The Master went still further and declared that he would rely on the files utterly—to the extent of disregarding any of petitioners' testimony that might seem to him inconsistent with his *ex parte* observations (105a).

Pursuant to the Master's direction, a number of files were turned over to him. They were not identified, other than by name, not even marked for identification, and to this day we do not know their contents. At that point the harm to petitioner was complete. Any further protest during the hearing would have been futile and, perhaps, vexatious—contrary to the accepted federal rule that an attorney need not persistently reiterate a position once firmly taken.

The *ex parte* use of defendants' files was repeated by the District Judge. The Judge had declined even to hear oral argument before confirming the Master's conclusions. Hence the only hearing before the District Judge subsequent to the reference to the Master occurred on petitioners' motion for a rehearing. There, relying completely upon the once-again withheld files, the Court declined to hear out the newly located former custodian of the files. The crucial nature of the testimony which the District Judge thus interrupted is shown at p. 15, *infra*.

In condoning this persistent denial of petitioners' constitutional rights on the basis of a tenuous negative implication, the Court of Appeals ignored this Court's consistent holdings that

> " * * * 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that 'we do not presume acquiescence in the loss of

fundamental right.'" (Citing *Ohio Bell Telephone, supra.*)

Johnson v. *Zerbst*, 304 U. S. 458, 464 (1937).

3. The right to know the evidence does not apply here, it is said, since the files were not necessary to fill a gap in the affirmative proof. Such a limitation on the right to a fair trial is insupportable. A person who is denied due process is little concerned whether this facilitates the affirmative case against him or merely frustrates his efforts to defend himself.

For this dangerous doctrine no authority was cited. It seems to be a mutation from an *obiter* phrase in *United States* v. *Coplon*, 2 Cir., 185 F. 2d 629, 638, where Judge Learned Hand said that a prosecutor may not "fill a gap in his own evidence by recourse to what he suppresses." In fact, Judge Hand denied the asserted difference between attack and defense, saying:

> "However, the refusal to allow the defense to see them was, as we have said, a denial of their constitutional right, and we can see no significant distinction between introducing evidence against an accused which he is not allowed to see, and denying him the right to put in evidence on his own behalf" (185 F. 2d at 638).

4. On the motion for rehearing petitioners were finally granted their first opportunity to be heard by the District Judge (apart from the occasion of his reference of the proceeding to a Special Master). The Judge purported to conduct a formal hearing, hear witnesses and exercise his discretion based on evidence. But in fact the hearing was a travesty, and the Judge violated every standard prescribed by this Court as essential to the proper administration of justice. One of the witnesses produced at the rehearing, was one Hilton—the custodian of the file. The judge prevented him from testifying to two basic facts, either of which alone would have exonerated Isaeson: namely, that a) Isaeson had no access to the 16 mm. files:

and b) there was nothing in the files at the time Isaacson worked for the firm, except papers relating to the recovery of stolen prints.

As the Court of Appeals found:

> "* * * we are constrained to say that he acted far from judicially in his interruptions of the witnesses and counsel and his attitude showing personal pique and offense at the challenge to his prior ruling. He should not have taken the trial into his own hands, see United States v. Steiner Plastics Mfg. Co., 2 Cir., March 16, 1956; indeed, it would have been preferable that no formal hearing be held rather than one of partial character."

This description of the District Judge's conduct, although unusually strong for a reviewing court, was quite restrained in the light of the record (110a-217a). Judge Abruzzo is no stranger to criticism by the Court of Appeals. Judge Learned Hand, in *United States* v. *Andolscheck*, 142 F. 2d 503, 506-6, in reversing Judge Abruzzo, referred to his "asperity and discourtesy," "the outbursts of petulant irritation which repeatedly marred the serenity of the courtroom" and the "indignity to counsel."

Under the standards required by due process of law and the fair administration of justice in the federal courts, the perversion of the judicial process resulting from Judge Abruzzo's conduct of this case demands correction.

5. The importance of correcting the violations of basic procedural rights in this case is highlighted by the fact that in its substantive aspects it is the latest in an important and growing body of cases of disqualification of attorneys. In three short years, the law of disqualification has been radically extended in a series of proceedings involving the major motion picture companies. These cases have elicited widespread concern in the profession, and commentators have noted the danger that disqualification proceedings might be abused. See, e.g., note, *Disqualification of Attor-*

neys for Representing Interests Adverse to Former Clients, 64 Yale L. J. 917, 928 (May, 1955); Case Note, 68 Harv. L. Rev. 1084, 1085-6 (April, 1955); Note, *Attorney Disqualified Where Past Legal Association Results in Conflict of Interest*, 6 Syracuse L. Rev. 360, 362 (Spring, 1955).

The instant case marks a nadir in the rights of formerly employed lawyers. Previously, the harsh remedy of disqualification was reserved for the rare occasion where it seemed necessary to protect a client from the threat of misuse of confidential information acquired by his former attorney. Recent decisions have made it impossible, however, for any lawyer properly to defend himself from a determined disqualification charge in any important case against a client of his former employer. Now the point is reached where "affirmative exoneration [is] vital for their salvation" ~~(Gn).~~ *in fra* p. 26.

These developments threaten not only the practice of the legal profession, but also the public interest in vigorous civil enforcement of the antitrust laws. For the tactic of instituting disqualification proceedings has been subject to particularly widespread use by motion picture company defendants in their efforts to harass and delay antitrust plaintiffs and their counsel. Thus, motion picture company defendants made several motions to disqualify the former partner of the young man who had been disqualified in *Consolidated Theatres, Inc.* v. *Warner Bros.*, 2 Cir., 216 F. 2d 920. In another case, they attacked four other attorneys, but apart from delay—gained only a minor victory against one. *T. C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S. D. N. Y., 1953), noted in 26 Rocky Mountain Law Review 195. Shortly after the *Consolidated* case, the former partner of an allegedly disqualified attorney—Isaacson, the petitioner herein—was vicariously disqualified even after dissolution of the partnership and in the absence of the receipt of any confidential information. *Laskey Bros. of W. Va., Inc.* v. *Warner Bros. Pictures, Inc.*, 2 Cir., 224 F. 2nd 824, cert. denied 350 U. S. 932. A com-

mentator in 3 U. C. L. A. L. Rev. 105 (Dec., 1955), noted that the decision revealed "lack of precedent" and expressed concern about "harshness in individual cases."

The final blow to former legal employees is dealt in the instant case. *Consolidated Theatres* held a lawyer disqualified on "inference". 216 F. 2d at 924. In the instant case a lawyer is disqualified on the mere inference that he had "access" to files which he has been denied the right to see.

The importance of the basic right denied in this case is illustrated by the only major case in recent years which we have been able to discover in which an attempt to disqualify failed. *United States* v. *Standard Oil Co.* (*N. J.*) *et al.*, 136 F. Supp. 345 (S. D. N. Y., 1955). There the Government moved to disqualify the entire firm of Sullivan & Cromwell because one of its youngest partners had worked on oil matters for the Government before he became a partner. There, as here, the case for disqualification rested on the attorney's alleged knowledge of a number of documents. In that disqualification proceeding the accused firm, unlike the present petitioners, was given full access to the documents. This right to examine the documents provided their salvation. The accused attorneys were able to exonerate themselves only because they were granted the opportunity to study and rebut each of the documents relied upon by the moving party. The District Court appended to its opinion a lengthy appendix referring to each document and listing both the movant's damaging construction and the respondent's explanation.

As the *Standard Oil* case demonstrates, the rapid and broad extensions of the substantive law of disqualification are proper despite the widespread concern expressed by the bar and by commentators, it is of particularly vital importance that such new principles be enforced in proceedings assuring the accused attorneys the full protection of their procedural rights before an impartial tribunal. This Court should therefore be particularly concerned by the several violations of fundamental rights presented by this

case. The disregard of vital procedural guarantees in a case involving a harsh and rapidly expanding body of law presents problems of urgent importance to the livelihood of attorneys, the enforcement of the antitrust laws, and the maintenance of constitutional principles.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted.

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Opinion of United States Court of Appeals, For the Second Circuit.

Before: CLARK, *Chief Judge*, and FRANK and HINCKS, *Circuit Judges*.

Fisher Studio, Inc. and Robert V. Fisher, plaintiffs in an antitrust action against Loew's Incorporated and fourteen other defendants, together with their attorneys appeal from an order disqualifying the attorneys David H. Isacson and Malkan & Isacson, appeal from an order disqualifying the attorneys from acting for the plaintiffs in this action and a subsequent order disqualifying them in certain other actions. Modified and affirmed.

CLARK, *Circuit Judge*: This is another of the several appeals before us recently involving the issue of attorneys' disqualification for previous representation of the defendants in antitrust cases. The background of this case is set forth in *Laskey Bros. of W. Va.* v. *Warner Bros. Pictures*, 2 Cir., 224 F. 2d 824, certiorari denied 350 U. S. 932, which actually concerns a later disqualification of attorneys dependent on the facts here brought out below. See also *Consolidated Theatres* v. *Warner Bros. Circuit Management Corp.*, 2 Cir., 216 F. 2d 920, establishing the controlling principles of law.

This particular appeal comes from orders made in an antitrust action brought by certain exhibitors of 16 mm. motion picture films against fifteen film producers and distributors alleging arbitrary restriction upon the distribution and exhibition of 16 mm. films and the establishment and maintenance of a price-fixing system against the plaintiffs. Plaintiffs, their attorney David H. Isacson, and the dissolved law firm of Malkan & Isacson are appealing from an order of the district court disqualifying Isacson and his firm from representing the plaintiffs. Upon defendants' original motion for disqualification the court referred the matter to Special Master Harold F. McNiece, who filed a report of over 200 pages concluding that both

Isaeson and the firm were disqualified. Judge Abruzzo adopted and confirmed the report and ordered the recommended disqualification. Subsequently he denied a motion for new trial on the issue of disqualification. The appeal is from both these orders. Later the judge entered a third order interpreting a prior stipulation of the parties, by which interpretation the disqualification was made applicable to all 35 mm. and 16 mm. antitrust cases and underreporting cases to which defendants were party. This, too, is the subject of appeal, with a request for consolidation of the appeals.

The facts upon which the disqualification was based were exhaustively developed in the proceedings before the Special Master and are set forth in convincing detail in his thorough report. We shall make only a summary reference to them here.

Isaeson was employed by the law firm of Sargoy & Stein between November, 1946, and March 1951. Sargoy & Stein was organized in 1946, and during the period of Isaeson's employment was the legal representative of eight of the present defendants or their corporate predecessors, if any, in matters closely related to this suit. It also rendered services to and received compensation from a ninth defendant in respect to treble-damage antitrust claims. Sargoy & Stein rendered services to four other defendants, which were either subsidiaries or film distributors of its clients, but received no compensation from them. As to the other two defendants, which also acted as film distributors for certain of Sargoy & Stein's clients, the evidence is unclear, but the law firm "may" have dealt with matters involving these defendants.

Sargoy & Stein first employed Isaeson as an auditing clerk, but from the early part of 1947 he assumed the duties of a lawyer and his name appeared on the firm's letterhead. As a member of the firm's staff, he was in a position to acquire knowledge of the manner in which the companies did business in the 16 mm., as well as the 35 mm.,

field. This included knowledge as to which companies produced 16 mm. prints; the use to which they put them; the manner of licensing of 16 mm. pictures for exhibition; the limitations, if any, that were imposed on the distribution; the contractual provisions between the companies and their licensees, limiting the use of the pictures; and the terms of the licenses. All this information was accessible to him from the files of Sargoy & Stein.

During Isaeson's employment, the firm brought or participated in 464 suits on behalf of distributors against exhibitors for percentage frauds or underreporting or other actions for recovery of rentals. Of these, at least 233 involved antitrust defenses, counterclaims, or countersuits by exhibitors. Of these 233 cases, Isaeson, then on behalf of distrbutors, initialed or marked memoranda or correspondence in every one, wrote letters or memoranda in 170 of the cases, and participated in taking depositions in 72. There was convincing evidence that Isaeson worked on and was well acquainted with the antitrust aspects of a number of cases and his evasive testimony at the Master's hearing did not serve to rebut this conclusion. Although his work primarily involved 35 mm. matters, he had access to the 16 mm. files and 16 mm. matters were on occasion discussed with him. In any event, 35 mm. and 16 mm. antitrust problems are so related that confidential information gained in one area would be of value in the other.

Fisher, one of the plaintiffs in this action, first came into contact with Sargoy & Stein in 1946 when he visited their office. Isaeson met Fisher through a mutual acquaintance in that office. Isaeson left Sargoy & Stein in March, 1951; and the complaint in this action was filed in September, 1952. There was testimony that in August, 1952, Isaeson telephoned an attorney employed by Sargoy & Stein to inquire if he knew the names of persons in the 16 mm. film field who might have justifiable complaints and asked specifically about Fisher. And there were other circumstances from which solicitation of this suit by Isaeson might have been strongly inferred.

On the basis of all the evidence both the Special Master and Judge Abruzzo found that Isaeson had violated Canons 6 and 37 of the Canons of Professional Ethics of the American Bar Association [1] by utilizing the private and confidential information obtained while an employee of Sargoy & Stein as a basis for a lawsuit against the clients of that firm. The Master further found that he had violated Canons 27 and 28 [2] by soliciting the lawsuit. Judge Abruzzo entered an order of disqualification as to all defendants on the basis of improper use of confidential information alone, but the Special Master relied on this ground as to the nine clients of Sargoy & Stein only, and upon solicitation as to the other defendants.

There was ample evidence to support findings of violation of Canons 6 and 37. It is apparent that Isaeson had access to significant quantities of confidential information of great value in the prosecution of this case. In fact the inference is overwhelming that Isaeson's primary value to the plaintiffs here lies in his possession of this information. Isaeson left Sargoy & Stein early in March, 1951, and did not

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[1] Of Canon 6, "Adverse Influences and Conflicting Interests," the most pertinent part here is the last paragraph, *viz.:*

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

The first two sentences of Canon 37, "Confidences of a Client," are as follows: "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information."

[2] Canon 27 holds it unprofessional to solicit professional employment through advertising, touters, or personal communications, while Canon 28 so treats the stirring up of litigation, directly or through agents.

enter into partnership with Malkan until July, 1952. During that time he unsuccessfully tried to obtain legal employment, operated a garage, and even made an effort to rejoin Sargoy & Stein. His lack of legal success during this interim period when viewed in connection with the formation of the partnership and the subsequent institution of this lawsuit lend impressive weight to the conclusion that the confidential information was the principal reason for his retainer by Fisher.

Similarly, if here pertinent, the evidence of solicitation is clear cut and convincing, and in many cases is interwoven with the evidence of improper use of confidential information. For example, the Special Master found that Isacson sent a letter on one Coy, a potential client who was then engaged in litigation against certain motion picture companies represented by Sargoy & Stein, stating "that Mr. Isacson here was formerly with Sargoy & Stein and is familiar with the procedures and tactics and settlements." The record is replete with other evidence of solicitation and advertisement. As pithily put by the Special Master, "All that was missing from Mr. Isacson's campaign was a neon sign."

Appellants' principal argument is directed to an alleged deprivation of due process on the ground that they were denied the opportunity to inspect certain 16 mm. files of Sargoy & Stein which were submitted to the Special Master and inspected by him. It appears, however, that the files were produced only upon the demand of appellants and over the objection of appellees that they were privileged communications relevant to the main action. Appellees therefore did not rely upon the files, which thus were not presented to fill gaps in their proof. It seems from the colloquy set forth in appellants' appendix that they did not then object to the Master's refusal to allow them to inspect the files concerning the 16 mm. films; in any event, at the end of the hearing they expressly agreed to waive all evidentiary objections not raised in their brief before the

Master. They now refer to asserted objections in their brief before the Master and in their later formal document entitled "Objections to Confirmation of Master's Report." The former is not before us, but the latter is and shows by the very general nature of the objections cited that the then trial counsel did not have particularly in mind the point now stressed. In fact it was not urged until almost two months after the judge had handed down his opinion confirming the Master's Report. Hence appellants' waiver was complete, and they sould not be heard to raise the point here. See *State ex rel. McKittrick* v. *Wallach*, 353 Mo. 312, 182 S. W. 2d 313, 155 A. L. R. 1. But on the equities there is little to be said for such a violation of privacy as would be involved in thus opening these private files to a public and rival gaze; even if appellants' rather exaggerated emphasis upon a supposed separation of 35 mm. and 16 mm. business be somewhat accepted, the most that appellants could hope to achieve would be to lessen the cumulative effect of the evidence, but not to provide that affirmative exoneration which is vital for their salvation. We think that the Master exercised a wise discretion in his ruling, and that the court acted properly in affirming it.

Appellants further object to the denial of their motion for a new trial based primarily upon grounds of newly discovered evidence. This evidence consisted in essential part of the testimony of one Siegel—attempting to modify his testimony before the Master—and one Hilton, who had not testified previously. The court granted a hearing at which an attempt was made to show that the information in the 16 mm. files had not in fact been available to Isaacson while he was in the employ of Sargoy & Stein. It is quite doubtful that this "newly discovered evidence" could have changed the result if a new trial had been granted. See *Irvin* v. *Buick Motor Co.*, 8 Cir., 88 F. 2d 947, 951, certiorari denied 301 U. S. 702; *Glade* v. *Allied Electric Products*, 7 Cir., 135 F. 2d 590. In any event there was not an abuse of discretion in refusing to grant a new trial on the basis of the dubious evidence presented by appel-

lants. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474; *Campbell* v. *American Foreign S. S. Corp.*, 2 Cir., 116 F. 2d 926, 928, certiorari denied 313 U. S. 573; *Gillette Safety Razor Co.* v. *Triangle Mechanical Laboratories Corp.*, 2 Cir., 87 F. 2d 699, 702. Appellants object to the conduct of this hearing by the judge, and we are constrained to say that he acted far from judicially in his interruptions of the witnesses and counsel and his attitude showing personal pique and offense at the challenge to his prior ruling. He should not have taken the trial into his own hands, see *United States* v. *Steiner Plastics Mfg. Co.*, 2 Cir., March 16, 1956; indeed, it would have been preferable that no formal hearing be held rather than one of partial character. But appellants' fate was clear after the thorough trial before the Master; and however regrettable this incident, it should not lead to a reversal of a long and well-proven case with a salutary conclusion.

Appellants also object to the judge's further order of March 22, 1955, interpreting a prior stipulation of the parties and disqualifying Isaacson as to 35 mm., as well as 16 mm., antitrust actions. The appeal from this order was taken by Malkan and Ellner and the law firm of Malkan & Ellner—a later partnership than the one here most directly involved. But, particularly since Malkan is an active participant in both appeals, we see no reason to dismiss this appeal for want of prosecution, as defendants urge. Plaintiffs seek to hold the order beyond the jurisdiction of the court, since the previous appeal had already been taken when it was entered. Were this a review of a seemingly final judgment in the main antitrust action, the point would doubtless be well taken; but since these orders of disqualification are collateral to the main case and this final order but interprets the stipulation of the parties to deduce from it the extent of future disqualification, we think it also appropriately treated as a separate and collateral proceeding. On the merits it seems within the terms of the stipulation. Compare *Laskey Bros. of W.*

Va. v. *Warner Bros. Pictures, supra,* 2 Cir. 224 F. 2d 824, certiorari denied 350 U. S. 932.

Finally, we reach the question whether the disqualification should properly run in favor of all fifteen defendants in the present action or only those who were clients of Sargoy & Stein when Isaacson was associated with that firm. While the district court found sufficient similarity of interest, exchange of information, and consort of action among all the defendants to justify a disqualification as to all, we think the evidence is not clear enough to support such a sweeping ban except as to those nine defendants who were former clients of the law firm. *Consolidated Theatres* v. *Warner Bros. Circuit Management Corp., supra,* 2 Cir. 216 F. 2d 920, 928. We do not however regard our holding here as *res judicata* with respect to suits against the other six defendants. While lawyers ought not to be subjected to recurrent harassment by way of disqualification proceedings, the power of the court to control its officers is continuous and the remedy of disqualification is an instrument to that end. Our holding is based on lack of evidence, not necessarily on the absence of any case; if further facts justifying disqualification appear, the district court is at liberty to take such action as it deems appropriate.

We do not think that the solicitation shown here may form a separate ground for disqualification and thus justify such action as to the six nonclient defendants. Solicitation may well merit appropriate discipline; but it appears quite incongruous that disqualification should be the remedy, separating the client from his counsel without substitution of other protection for the client's interest. And the possibilities of endless disputes at the inception of lawsuits as to how the business was obtained are not to be overlooked.

Hence we find David H. Isaacson and the firm of Malkan & Isaacson properly disqualified under the terms of the order of March 22, 1955, as to the defendants Loew's Incorporated, Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, Warner Bros. Pictures,

Inc., Warner Bros Pictures Distributing Corporation, RKO Radio Pictures, Inc., Columbia Pictures Corporation, Universal Pictures Company, Inc., and Republic Pictures Corporation; but this order of disqualification will not run as to the other defendants. The orders appealed from will therefore be modified to eliminate these other defendants as indicated; as thus modified they are affirmed. No costs will be taxed on this appeal.

Modified and affirmed as modified.

HINCKS, Circuit Judge, concurring.

Although in complete agreement with the majority opinion, I feel constrained to say that I acquiesce in the failure of the court to refer the case for the institution of disciplinary proceedings against Mr. Isaacson only because of my belief that on the facts of this case his adjudged disqualification, even though not imposed as disciplinary action, serves as an adequate penalty for all such unprofessional conduct as was disclosed in the disqualification proceedings below in the findings which we have affirmed.